Bohari bin Jaya & Ors v Naim Land Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–201–06 OF 2014
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
10 MARCH 2016

Land Law — Customary land — Claim of — Appellants claimed respondents interfered with their native customary rights ('NCR') to land but could not define which area they laid claim to — Appellants also could not prove NCR created over claimed land prior to 1 January 1958 — Whether appellants failed to prove their case on balance of probabilities — Whether appellants' case suffered not only from serious lack of proof and credibility but riddled with inconsistencies and even admissions by witnesses during testimony at trial that undermined their claim

The appellants, who were natives of Sarawak, sued the respondents in the High Court claiming their native customary rights ('NCR') over 85.9 hectares of land in Sungei Adong in the Kuala Baram district of Miri had been interfered with by the action of the second and third respondents in granting the first respondent provisional leases over their NCR land. To legitimise their claim from the perspective of the land laws of Sarawak, the appellants contended that they had inherited NCR to the claimed land from their forefathers who had continuously cultivated and occupied the land since before 1 January 1958. After a full trial, the High Court held that, on a balance of probabilities, the appellants had failed to show they had acquired NCR over the claimed land in accordance with Sarawak law. On the evidence, the trial judge found the appellants could only have been farming on the claimed land for ten to 15 years and there was no documentary or other proof to show their forefathers had settled on or cultivated the land since 1947 or before 1 January 1958. The trial court found serious doubts in the credibility of the appellants' claim — in particular, none of the birth certificates of the appellants showed they were born in the claimed NCR area; the appellants were unable to identify on a map of the claimed NCR land that they had attached to their pleadings, which individual plots belonged to them; despite the claimed NCR land being included in the Lower Baram Forest Reserve and a concession being given to a private company to carry out logging activities, the appellants had never raised any protest for nearly 47 years; and a written application dated 26 August 1992 by 118 persons — including the first, sixth, ninth, tenth and twelveth appellants — to the Miri district office for land for farming at Sungei Adong stated that many of them had been farming at Sungei Adong for ten to 15 years only. In the instant appeal against the High Court's decision, on the ground, inter alia, that the trial judge had failed to judicially appreciate all of the evidence, the appellants reduced their NCR claimed area to 58.9 hectares only

based on a map the second and third respondents had tendered in evidence at trial. Aerial photographs of the 58.9 hectares taken in 1947 and again in 1961 showed 'shifting cultivation' had taken place in the area. The respondents submitted that the appellants' failure to adduce evidence to identify the exact location of the claimed NCR land and its boundary — a 'Map/Plan X' that was attached to the appellants' statement of claim was never admitted in evidence at trial — was a failure to discharge its burden of proof. There was also no evidence that the appellants or their forefathers had cleared, cultivated or occupied the claimed land before 1 January 1958. The respondents also contended that the evidence of the village penghulu ('DW1') that the appellants' NCR claim was not genuine was never challenged whilst the tenth and 12th appellants in cross-examination undermined the appellants' case by admitting that they had only come to the claimed area, at the earliest, in the 1970s.

Held, dismissing the appeal:

(1) The appellants had, on the evidence, clearly failed to identify with some degree of certitude the location of their claimed NCR land and, even if the Court was to be generous or flexible on this issue of threshold evidentiary requirement, it was clear that there was no evidence that such NCR over the land was in fact created prior to 1 January 1958 by the appellants or their forefathers. There was no error on the part of the trial judge in his conclusions either in law or on the facts (see para 32).

(2) The appellants conceded that their 'Map/Plan X' had not been formally admitted in evidence during trial or its maker called to verify the sources relied upon or otherwise to confirm its accuracy. From the evidential perspective, this fundamental threshold obligation on the appellants to identify the location of the claimed NCR land by way of its approximate boundaries at least, had not been met at trial by the appellants (see para 23).

(3) What the appellants subsequently relied upon to identify their claimed NCR land was merely the material that was introduced by the respondents in their evidence. This was obvious as the appellants restricted their claimed area in the appeal to 58.9 hectares (not 85.9 hectares as pleaded), coinciding with the 'area of shifting cultivation' that was identified from the aerial photographs of that region taken in 1947 and later in 1962. This 'fall-back' approach taken by the appellants to identify the exact alleged encroached area ought not to be condoned by the courts, notwithstanding the application of a flexible approach, as judicially encouraged, with respect to dealing with NCR claims. If such a latitude was allowed wherein the appellants' required proof of the location was based solely on the respondents' evidence, this would amount to the courts approving a shifting of the burden of such proof

(which was always upon the appellants) to the State and other affected parties. There was therefore merit in the submission that there was no evidence from the appellants duly admitted by the court as proper evidence as regards the location of the claimed NCR land for the court to adjudicate upon, and that accordingly, no further enquiry was necessary (see paras 24–25).

(4) Even if the appellants were allowed to rely on the material that had been put in evidence for the respondents, it was obvious that the 1947 aerial photographs was indicative only of an 'area of shifting cultivation' of about 58.9 hectares. It still begged the question who had cleared the same and, more pertinently, if it was indeed the appellants' ancestors who had cleared and used that area (see para 26).

(5) The trial judge was correct to conclude that such of the appellants who testified in court were unable to personally identify the plots of land over which they or their forefathers had allegedly NCR claims, that is, even with reference to 'Map/Plan X'. The trial judge did not misdirect himself in concluding, from the letter of 26 August 1992 seeking an allotment of land for farming, that the appellants or their immediate ancestors, if at all, had only come onto the claimed land in the 1970s or thereabouts to cultivate the same. There was no shred of evidence that any of the appellants' forefathers had carried out some physical activity on the claimed area prior to 1 January 1958 to displace that conclusion. There was also the evidence of DW1, the penghulu of the area, who was firm in his testimony that none of the appellants had any NCR claims over the subject land. This evidence of a local chieftain remained materially unchallenged (see paras 26–27 & 31).

[Bahasa Malaysia summary

Perayu-perayu, yang merupakan anak negeri Sarawak, telah menyaman responden-responden di Mahkamah Tinggi mendakwa hak-hak adat anak negeri mereka ('HAAN') ke atas 85.9 hektar tanah di Sungei Adong di daerah Kuala Baram di Miri telah diganggu oleh tindakan responden-responden kedua dan ketiga dalam memberikan responden pertama pajakan sementara ke atas tanah HAAN mereka. Untuk mengesahkan tuntutan mereka daripada perspektif undang-undang tanah Sarawak, perayu-perayu berhujah bahawa mereka telah mewarisi HAAN kepada tanah yang dituntut daripada nenek moyang mereka yang telah berterusan bercucuk tanam dan mendiami tanah itu sejak sebelum 1 Januari 1958. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan bahawa, atas imbangan kebarangkalian, perayu-perayu telah gagal menunjukkan mereka telah memperoleh HAAN ke atas tanah yang dituntut menurut undang-undang Sarawak. Berdasarkan keterangan, hakim perbicaraan mendapati perayu-perayu hanya boleh menjalankan pertanian atas tanah yang dituntut itu selama sepuluh hingga 15 tahun dan tiada bukti dokumentar atau bukti lain untuk menunjukkan nenek moyang mereka telah

menetap di atau mengusahakan tanah itu sejak 1947 atau sebelum 1 Januari 1958. Mahkamah perbicaraan mendapati terdapat keraguan serius dalam kebolehpercayaan tuntutan perayu-perayu — khususnya, tiada daripada sijil-sijil beranak perayu-perayu menunjukkan mereka dilahirkan dalam kawasan HAAW yang dituntut itu; perayu-perayu tidak dapat mengenal pasti atas pelan tanah HAAW yang dituntut yang mereka telah lampirkan pliding mereka, yang mana plot-plot individu dimiliki mereka; meskipun tanah HAAN yang dituntut termasuk dalam Rizab Hutan Baram dan satu konsesi diberikan kepada syarikat persendirian untuk menjalankan aktiviti pembalakan, perayu-perayu tidak pernah menimbulkan apa-apa bantahan selama hampir 47 tahun; dan permohonan bertulis bertarikh 26 Ogos 1992 oleh 118 orang — termasuklah perayu-perayu pertama, keenam, kesembilan, kesepuluh dan ke-12 — kepada pejabat daerah Miri untuk tanah bagi bercucuk tanam di Sungei Adong menyatakan bahawa kebanyakkan daripada mereka telah bercucuk tanam di Sungei Adong selama sepuluh hingga 15 tahun sahaja. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, atas alasan, antara lain, bahawa hakim perbicaraan telah gagal untuk menghayati secara kehakiman kesemua keterangan, perayu-perayu telah mengurangkan kawasan HAAN yang dituntut kepada 58.9 hektar hanya berdasarkan pelan yang telah ditenderkan oleh responden-responden kedua dan ketiga dalam keterangan semasa perbicaraan. Gambar-gambar foto aerial untuk 58.9 hektar itu telah diambil pada 1947 dan sekali lagi pada 1961 menunjukkan 'shifting cultivation' telah berlaku di kawasan itu. Responden-responden berhujah yang kegagalan perayu-perayu untuk mengemukakan keterangan bagi mengenal pasti lokasi sebenar tanah HAAN yang dituntut dan sempadannya — satu 'Map/Plan X' yang dilampirkan kepada penyataan tuntutan perayu-perayu tidak pernah diterima masuk sebagai keterangan semasa perbicaraan — merupakan satu kegagalan dalam melepaskan beban buktinya. Juga tiada keterangan yang peryu-perayu atau nenek moyang mereka telah melapang, menanam atau mendiami tanah yang dituntut itu sebelum 1 Januari 1958. Responden-responden juga menegaskan bahawa keterangan penghulu kampung ('DW1') yang tuntutan HAAN perayu-perayu bukan tulen tidak pernah dicabar manakala perayu-perayu kesepuluh dan ke-12 dalam pemeriksaan balas mempertikaikan kes perayu-perayu dengan mengakui bahawa mereka hanya tiba di kawasan dituntut itu, paling awal, dalam 1970an.

Diputuskan, menolak rayuan:

(1) Perayu-perayu telah, berdasarkan keterangan, jelas gagal mengenal pasti pada tahap ketepatan tertentu lokasi tanah HAAN yang dituntut oleh mereka dan, jikapun mahkamah atau fleksibel tentang isu ini berhubung keperluan ambang keterangan, ia jelas bahawa tidak ada keterangan yang HAAN ke atas tanah tersebut sememangnya dibuat sebelum 1 Januari 1958 oleh perayu-perayu atau nenek moyang mereka. Tiada kesilapan di pihak hakim perbicaraan dalam kesimpulannya sama ada dari segi

undang-undang atau atas fakta (lihat perenggan 32).

(2) Perayu-perayu bersetuju bahawa 'Map/Plan X mereka tidak diterima masuk secara formal sebagai keterangan sepanjang perbicaraan atau pembuatnya dipanggil untuk mengesahkan sumber yang digunakan atau sebaliknya untuk mengesahkan ketepatannya. Berdasarkan perspektif keterangan itu, kewajipan ambang penting ini ke atas perayu-peryau untuk mengenal pasti tanah HAAN yang dituntut melalui anggaran sempadannya sekurang-kurangnya, tidak dipenuhi semasa perbicaraan oleh perayu-perayu (lihat perenggan 23).

(3) Apa yang perayu-perayu bergantung kepada akhirnya untuk mengenal pasti tanah HAAN yang dituntut itu hanya material yang diperkenalkan oleh responden-responden sebagai keterangan mereka. Ini jelas kerana perayu menyekat kawasan yang dituntut mereka dalam rayuan itu kepada 58.9 hektar (bukan 85.9 hektar seperti dipli), yang bersamaan 'area of shifting cultivation' yang dikenal pasti daripada gambar foto aerial daerah itu yang siambil pada 1947 dan kemudian dalam 1962. Pendekatan 'fall-back' ini yang diambil oleh perayu-perayu untuk mengenal pasti kawasan sebenar yang dikatakan dicerobohi tidak patut dipersetujui oleh mahkamah, meskipun terdapat pemakaian pendekatan fleksibel, seperti yang digalakkan secara kehakiman, berkenaan urusan tuntutan HAAN. Jika keadaan ini dibenarkan di mana bukti perayu-perayu yang dikehendaki berhubung lokasi itu adalah berdasarkan semata-mata pada keterangan responden-responden, ini merupakan mahkamah meluluskan peralihan bebas bukti sedemikian (yang sentiasa terletak pada perayu-perayu) kepada Kerajaan Negeri dan pihak-pihak lain yang terjejas. Oleh itu merit dalam penghujahan bahawa tidak ada keterangan daripada perayu-perayu yang telahpun diterima masuk oleh mahkamah sebagai keterangan wajar berkenaan lokasi tanah HAAN yang dituntut untuk diadili oleh mahkamah, dan bahawa sewajarnya, tiada siasatan selanjutnya adalah perlu (lihat perenggan 24–25).

(4) Jikapun perayu-perayu dibenarkan bergantung kepada material yang dikemukakan sebagai keterangan untuk responden-responden, ia adalah jelas bahawa gambar foto aerial 1947 itu menandakan hanya 'area of shifting cultivation' lebih kurang 58.9 hektar. Ia masih dipersoalkan siapa yang melapangkan kawasan itu dan, lebih penting, jika memang nenek moyang perayu-perayu yang telah melapangkan dan menggunakan kawasan tersebut (lihat perenggan 26).

(5) Hakim perbicaraan adalah betul dalam memutuskan bahawa perayu-perayu yang memberi keterangan di mahkamah tidak dapat mengenal pasti secara peribadi tapak tanah yang mana mereka dan nenek moyang mereka dikatakan menuntut HAAN itu, iaitu, jikapun dengan rujukan kepada 'Map/Plan X'. Hakim perbicaraan tidak salah arah dalam

memutuskan, daripada surat 26 Ogos 1992 memohon perolehan tanah untuk berladang, bahawa perayu-perayu atau waris terdekat, jika apa pun, hanya datang ke tanah yang dituntut itu pada 1970an atau di kawasan untuk bercucuk tanam. Tiada apa-apa keterangan bahawa mana-mana nenek moyang perayu-perayu telah menjalankan aktiviti fizikal atas kawasan yang dituntut sebelum 1 Januari 1958 untuk menafikan kesimpulan itu. Juga terdapat keterangan DW1, penghulu kawasan itu, yang tegas dalam keterangannya bahawa tiada daripada perayu-perayu mempunyai apa-apa tuntutan HAAN ke atas tanah tersebut. Keterangan penghulu tempatan kekal secara material tidak dicabar (lihat perenggan 26–27 & 31).]

Notes

For cases on claim of customary land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3369–3376.

Cases referred to

Agi anak Bungkung & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] MLJU 121, HC (refd)

Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80; [2013] 9 CLJ 828, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Hamit Matusin & Ors v Superintendent of Lands & Surveys & Anor [1991] 2 CLJ (Rep) 677, HC (refd)

Jimi Mantali & Ors v Superintendent of Lands and Surveys, Samarahan Division & Anor [2011] 1 CLJ 1000, HC (refd)

Superintendent of Lands and Surveys Department Sibu Division & Anor v Usang ak Labit & Ors and another appeal [2014] 3 MLJ 519, CA (refd)

UEM Group Berhad (dahulunya dikenali sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Land Code (Cap 81) ss 2, 13(1), 15(1)
Land Settlement Ordinance 1933 (Cap 28) s 66(b)

Appeal from: Suit No MYY-21–5/4 of 2012 (High Court, Miri)

Harrison Ngau (HNL & Co) for the appellants.
Shankar RP Asnani (Daniel Ling with him) (Thomas, Shankar Ram & Co) for the first respondent.
Mcwillyn Jiok (Senior Federal Counsel, Attorney General's Chambers) for the second and third respondents.

Varghese George JCA:

[1] This appeal before us was against a decision of the Miri High Court where, after a full trial, the learned trial judge had dismissed a native customary rights ('NCR') claim over land, brought by a group of 12 plaintiffs. They had cited the current owner of the claimed area and the state authorities as defendants.

In this judgment the parties will be referred to as they were at the High Court.

[2] As gleaned from the pleadings, the judgment of the learned trial judge and also the submissions before us of the respective counsel for the parties, the following formed salient aspects of the background to this case. Save for the matters in paragraphs (c) and (d) below which were contested by the plaintiffs, the rest was common ground between the parties:

(a) the plaintiffs were of Jati Meirek descent (considered as Malays) and therefore natives of Sarawak;

(b) the plaintiffs' NCR claim (as originally advanced) in their statement of claim was in respect of an area of 161.32 acres (85.9 hectares) of land situate at Sg Adong, Miri;

(c) by a *Gazette* Notification No 1806 published in the Sarawak Government *Gazette* dated 8 October 1965, an area of 105,500 acres had been declared as 'Lower Baram Forest Reserve (Third Extension)' including Sg Adong and Sg Adong Kechil with a specific reservation stated therein, namely, that '... the following people may farm in the existing temuda situated in Sungai Adong Besar and Sungai Adong Kechil...', and included in the list of such persons was one 'Surin b Jamban of Pujut' to farm at Sungai Adong Besar;

(d) the area asserted by the plaintiffs to be under NCR land, also fell within a timber extraction area covered by timber license No T/0003 issued to one Chip Foh Sawmill Co Ltd on 1 January 1966 and there had been logging activities in that concession of the said company since 1966;

(e) the claimed NCR area was now within the boundaries of:

(i) Lot 819 Block 13 (alienated on 20 July 1995);

(ii) Lot 3247 Block 11 (alienated on 20 July 1995); and

(iii) Lot 6434 Block 10 (alienated on 21 August 1997),

all in Kuala Baram District, in respect of which the first defendant had been issued with provisional leases by the state.

(f) by a *Gazette* Notification No 115 published in Sarawak State Government *Gazette* dated 27 December 2001, the claimed NCR area

fell within the boundaries of land earmarked and approved for development as the 'Tudan Special Development Area'. A

[3] The plaintiffs only filed this suit on 16 April 2012. Essentially their plaint asserted that the plaintiffs' grandparents had lawfully acquired and created NCR over the area now claimed during the Japanese occupation, their parents and the plaintiffs themselves had continuously cultivated and occupied the claimed area and according to their *adat* and custom the plaintiffs had the right to inherit the NCR attached to the area in question as the NCR thereon had never been extinguished. B C

[4] The above assertions obviously were to ground legitimacy for the plaintiffs' claim within the provisions of s 66(b) of the Land Settlement Ordinance 1933 (Cap 28) and ss 2 and 13(1) of the Sarawak Land Code (Cap 81). Basically, the plaintiffs' claim was that the NCR over the area in dispute was acquired by their forefathers before 1 January 1958. D

THE TRIAL

[5] After having heard 11 witnesses for the plaintiffs and five witnesses for the defendants, the learned trial judge summarised his findings in the following terms: E

> [26] In this case, on a balance of probabilities, the plaintiffs have not established that they have acquired and or inherited NCR over their claimed land. Based on the evidence adduced during the trial, Sapiee bin Gani and the first plaintiff had only farmed at the land claimed by them at Sg Adong about 10 to 15 years ago. There was no documentary proof or otherwise that their great grandparents had settled or cultivated the land at Sg Adong claimed by them since 1947 or before 1 January 1958. The evidence adduced at the trial showed that they have not acquired NCR over the land in accordance with the laws in Sarawak, ... F G

[6] In coming to the above conclusion, the learned trial judge in His Lordship's judgment highlighted the following:

(a) the plaintiffs themselves did not have any personal knowledge on the acquisition of NCR by their great or grandparents except that they had been told by their parents so. The plaintiffs had not either produced any documentary evidence to support their assertion that their grandparents had acquired NCR rights over the area claimed prior to 1 January 1958; H

(b) the identity card of the first plaintiff (who had passed away subsequent to the filing of this writ) was never produced to verify the claim that he was born in Sg Adong, the NCR land in question, in 1924. None of the birth certificates of the plaintiffs showed that they were born at the claimed NCR land. The birth certificate of the tenth plaintiff ('PW2') I

showed he was born at Kampung Pujut Miri which contradicted his testimony itself that he was born at the alleged NCR land;

(c) the so called 'family tree' produced by the eleventh defendant ('PW10') was from their grandmother's (Hilipah bt Jamban) side and not from their grandfather's side showing the grandfather's siblings. In any event the 'family tree' had not been certified by any *Ketua Kampung* or District Office as to its correctness;

(d) the plaintiffs' claimed NCR rights was shown in a map marked 'X' (attached with the writ — discussed further in this judgment). There were 19 plots of land within the claimed NCR land but the witnesses for the plaintiffs were unable to identify the individual plots which were claimed or belonged to them. The first plaintiff's statutory declaration had adverted to Suriati bt Asit, Sapiee bin Gani and Aris bin Gani as those cultivating on land adjacent to the claimed NCR land but none of the witnesses could identify these pieces of land either. The plaintiffs had not been able to identify their respective claimed land and this raised doubts as to the credibility of their claims; and

(e) if the plaintiffs had a genuine or credible NCR claim, they should have taken action to protect their interest in the land at the earliest indication of encroachment. Despite the land being included in the Lower Baram Forest Reserve and also being given to a company for logging, the plaintiffs merely sat on their rights for nearly forty seven years. Such inaction raised serious doubts as to the genuiness of their NCR claim now being pursued.

[7] Perhaps the crucial piece of evidence that appears to have weighed upon the learned trial judge's mind when the court dismissed the plaintiffs' claim was the existence of a letter dated 26 August 1992 discussed in paras 23–25 of the judgment. These paragraphs are reproduced in full below:

> [23] The evidence showed that by a letter dated 26 August 1992 (pp 30–35 of BOD3), 118 persons had applied to the District Office, Miri for land at Sg Adong to be given to them for farming. The application letter stated that many of these persons had been farming the land at Sg Adong for many years; for example Sapiee bin Gani and Alek bin Tahar had been farming at the land for about 15 years whereas Hj Hussien, Juli Suhaili and Mat Sudin Ibrahim had been farming at the land for about ten years. The first plaintiff, the sixth plaintiff, the nineth plaintiff, the tenth plaintiff and the twelfth plaintiff were included in this list as applicants for the land at Sg Adong. Based on this letter, if they had farmed at the land at Sg Adong they would have done so for about 10 to 15 years only, not prior to 1,1,1958. The plaintiffs did not call Nasiah binti Dahlan, the writer of the letter, to disprove the contents of this letter.
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> [24] Since the first Plaintiff had affirmed that Sapiee bin Gani was farming the land adjacent to his farms at Sg Adong, and based on the letter dated 26 August 1992, Sapiee bin Gani had only been farming at Sg Adong for about 15 years and not prior

to 1 January 1958. This letter, on behalf of some of the plaintiffs and Sapiee bin Gani, had contradicted their claims that they have acquired and or have inherited their claimed NCR land at Sg Adong prior to 1 January 1958.

[25] The evidence showed that Sapiee bin Gani and others had sued the first, second and third Defendants in Suit No 21-01 of 2009 (MR)/1, inter alia, for a declaration that they had acquired NCR over an area of land at Pujut Sungai Adong, Miri. This suit was consolidated for trial with Suit No 21-02 of 2009. After the full trial, the presiding High Court judge ruled that the plaintiffs in those suits had failed to establish that they had acquired NCR over their claimed land at Sg Adong and the suits were dismissed with costs. This again supported the contentions of the defendants that the plaintiffs and Sapiee bin Gani have not acquired and have not inherited NCR over their claimed land at Sg Adong.

THE APPEAL

[8] At the outset of the appeal before us, learned counsel for the plaintiffs (the appellants) prefaced his submissions by what he termed as 'Concessions by the Appellant'. They were two. The first was that should the plaintiffs succeed in this appeal, they would be limiting the remedy being sought to only damages to be assessed/awarded for the loss of the claimed NCR area, and not for restoration of the lands (physically, that is) to them.

The second was that premised on the aerial photographs taken over that area in 1947 and tendered by the defendants in evidence, the plaintiffs would be confining their NCR claim now to an area of 58.9 hectares only (as also reflected in the map/plan Appendix A produced and introduced by the second and third defendants at the trial) and thereby would no longer be pursuing their claim for NCR over 85.9 hectares (161.32 acres) as set out in their statement of claim.

[9] The main plank of the submissions in appeal was that the learned trial judge had failed to give sufficient consideration to or otherwise there had occurred a lack of judicial appreciation of both the documentary and oral evidence led before the court. In this respect counsel argued that the approach to be taken by a court when dealing with proof of NCR claims should be somewhat flexible, in that, in interpreting the evidence that exists, the court should do so with a consciousness of the unique and special nature of aboriginal claims and the inherent difficulties in proving such rights which naturally go back in time, as was noted by David Wong J (now JCA) in *Agi anak Bungkung & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] MLJU 121.

[10] Counsel for the plaintiffs elaborated and highlighted before us the following:

(a) DW4, a witness for the defendants (a cartographer attached to the Land and Survey Department Headquarters at Kuching) had testified that

upon examination and comparison made of aerial photographs taken over the same area in 1947 and then in 1961 there was evident an 'Area of Shifting Cultivation' of 58.9 hectares in 1947 and of about 62.0 in 1961. And this was borne out also in the 'Bakong-T735 Series Map' published by the Director of National Mapping Malaysia in 1974;

(b) there were neutral witnesses, namely, PW11 (Juli bin Aris), PW4 (Manai bin Junit) and PW5 (Ho Thian Ui) and their testimony that they had been to the claimed area and had seen the first plaintiff or members of his family cultivating or occupying the land in question, was not considered at all by the learned trial judge;

(c) there was no evidence adduced to justify the learned trial judge's conclusion that the claimed NCR land fell within the boundaries of the gazetted Lower Baram Forest Reserve (Third Extension) and there was no pleading to this effect as well;

(d) although it was not disputed that there was a forest license issued to Chip Foh Sawmill Sdn Bhd, the claim that actual logging had indeed taken place on the land was suspect, as firstly, DW4 had told the court that there was no logging but only shifting cultivation that had occurred at that area, and secondly, DW3 (Romy Pudong) from the Forest Department did not produce in court any relevant 'Permit To Enter Coupe', a necessary prerequisite before any logging activity was allowed to commence in a licensed area to prove such a claim;

(e) the learned trial judge had erred in holding that that the plaintiffs did not have personal knowledge of their forefathers acquiring NCR over the claimed area as PW10 (eleven th plaintif — Hamenah bt Ot) had given direct evidence to that effect;

(f) the failure to produce the birth certificates of the first, eighth and eleventh plaintiffs or the fact that the other plaintiffs were born elsewhere did not disprove the plaintiffs' NCR rights to the land in question;

(g) Nasiah bt Dahlan who principally signed the letter of 28 August 1992 to the Pegawai Daerah Miri, ought to have been called by the defendants since this letter was introduced by the defendants and the learned trial judge was in error therefore in applying adverse inference against the plaintiffs for the non-calling of this person;

(h) the provisional leases issued to the first defendant was in contravention of ss 2, 13(1) and 15(1) of the Sarawak Land Code (Cap 81) as the 'alienation' extended to cover land where NCR existed before 1 January 1958 and such right had not been extinguished or persons entitled to those NCR duly compensated for;

(i) the provisional leases were still subject to survey and were therefore 'temporary' or 'conditional' with no final or absolute right accrued thereon in favour of the first defendant for any limitation period to commence against the plaintiffs; and

(j) in any event, the injury or damage to the plaintiffs (by reason of the encroachment onto the NCR land) were still continuing and ongoing to the present and no statutory time-bar could in those circumstances be raised against the plaintiffs' action.

[11] The state legal officer for the second and third defendants submitted that the burden was always on the plaintiffs to prove their NCR over the claimed area as pleaded. To this end it was therefore incumbent upon the plaintiffs to firstly adduce cogent and credible evidence to identify the exact location of the claimed NCR area and its boundary in precise terms. This, it was argued, the plaintiffs had failed to do. A map 'X' was attached to their statement of claim but this was never included in the bundles of documents (agreed as to authenticity) and more significantly it was not tendered in evidence through its maker to constitute it as an admitted document at the trial. PW9 did make a reference to it in her evidence but this did not mean that the document could be accepted as a proved document.

[12] It was also contended for the second and third defendants that there was absolutely no evidence that the plaintiffs or their forefathers had been the ones who had cleared, cultivated or occupied the claimed NCR area before 1 January 1958. The plaintiffs' claim was an opportunistic one and lacked credibility. This had even been admitted by PW4 and PW2 in their own testimony in court. Alternatively, it was submitted that the plaintiffs action was statutorily time-barred when it was instituted.

[13] In his submissions counsel for the first respondent stated that the decision of the learned trial judge in this case turned essentially on questions of facts and the court was not in error in holding that the plaintiffs had failed on the evidence adduced in court to prove their alleged NCR claim over the land in question. Our attention was drawn to the contradictory statements, and even concessions of some of the plaintiffs who were also witnesses at the trial, which went to demolish the very foundations of the plaintiffs' case itself. Most significantly, these witness could not positively identify the plots of land that they personally cultivated or occupied in the alleged area and was inconsistent as between themselves as to the number of houses or buildings erected and whether such were on land or in the river.

[14] It was emphasised to us that the evidence of DW1, (Penghulu Ahmad bin Rahman, also a relative of the plaintiffs), that plaintiffs' NCR claim was not genuine, remained unchallenged. It was counsel's further submission that the

persons who had supported the letter of the 26 August 1992 (seeking allotment of land for farming) and who had put their respective signature as against the listed names attached to that letter included the first, sixth, ninth, tenth and twelfth plaintiffs. Their testimony generally, and most specifically of PW2 (tenth plaintiff) and PW10 (twelfth plaintiff), under cross-examination amounted to an outright admission that, in any event they had only come onto the claimed area at the earliest in the 1970s, to cultivate in the area and not earlier than that.

[15] Even the testimony of the so called neutral witnesses were not of assistance to the plaintiffs. PW4 was not certain that the first plaintiff had a valid NCR claim over the land in question and stated that the first plaintiff only moved into the Sg Adong area sometime around 1975. PW5 was only the agricultural officer in mid-70's in that area and had categorically stated under cross-examination that he did not know if any of the plaintiffs had established NCR rights of the land before 1958. As for PW11, he was, although not one of the plaintiffs in this case, also a signatory to the letter of 26 August 1992 and also his answers were evasive if analysed further.

OUR DISCUSSION AND DECISION

[16] There was no issue in this case as to what had to be proven by the plaintiffs to succeed on their NCR over the claimed land. A helpful summary of the law on NCR in Sarawak was captured by Haidar Mohd Nor J (as he then was) in *Hamit Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ (Rep) 677 in the following extract:

> Section 66 of the Land Settlement Ordinance (Cap 28) [1933] provides for the recognition of native customary rights, inter alia, in respect of 'land that has been in continuous occupation or has been cultivated or built on within 3 years'. Even the present Land Code (Cap 81) which came into force on 1 January 1958 gives explicit recognition of native customary rights by s 5 thereof. In s 2 of the Land Code 'native customary land' means, inter alia, 'land on which native customary rights, whether communal or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such'. *Section 5 would appear to draw a distinction between customary rights created before 1 January 1958 and thereafter. It imposes restrictions on the creation and recognition to such rights after 1 January 1958 while leaving undisturbed the position of native customary rights created prior to the said date.* We are here concerned with the situation prior to 1 January 1958. (Emphasis added.)

[17] The learned trial judge was therefore correct in focussing His Lordship's enquiry as to whether the plaintiffs had on evidence at the trial succeeded to establish that NCR rights as claimed, had been created prior to 1 January 1958 and was still subsisting as such. The burden was always on the plaintiffs to do so.

[18] This court had in the case of *Superintendent of Lands and Surveys Department Sibu Division & Anor v Usang ak Labit & Ors and another appeal* [2014] 3 MLJ 519, observed the best approach to be taken in dealing with NCR claims in the following terms:

> [10] It is best, therefore, in NCR cases to approach such a claim broadly in the following steps:
>
> (a) the *identification of the area* of alleged encroachment into the land over which NCR over land ('NCR land') is claimed;
>
> (b) the *bona fides of the claim* to the NCR right;
>
> (c) whether the particular NCR right relied upon is a right to the land over which the right is exercised; and,
>
> (d) where relevant, what was the NCR right to land that can be acquired.
>
> [11] The reasons are:
>
> (a) If the area of alleged encroachment is not or cannot be identified, there is nothing to be considered as possible encroachment.
>
> (b) If the claim made is not bona fide, for example it is false or purely opportunistic, or that he does not belong to a race that is native to Sarawak, there can be no basis for any claim of any NCR right over land.
>
> (c) Given that native customary rights could range between communal, familial and individual on the one hand, and on the other, to the right to pass and repass through land, right of access to land for various purposes and rights to land cleared and cultivated. If the right is one that can be separated from the land over which it is exercised, it cannot be a right to the land.
>
> (d) The NCR right over land that can be acquired under the Laws of Sarawak was varied over time as the law was changed. (Emphasis added.)

[19] More pointedly of relevance to the issue at hand in this case was the comments of the court in the case of *Jimi Mantali & Ors v Superintendent of Lands and Surveys, Samarahan Division & Anor* [2011] 1 CLJ 1000 and reproduced here:

> The important point to note, however is this. *When did the land clearance and/or cultivation start, for the physical act and the time of commission of the act is what determines whether the plaintiffs have native customary rights over the said land; not just the acts themselves.* In saying this, I also fully appreciate the position of the defendants in cases of this nature for claims of native customary rights is relatively easy to make and open to abuse. It is, I am sure, difficult to separate the genuine claimants from those who were out to exploit the situation, who knew that the current evidential requirement on proof in native customary rights cases allows reception of evidence based on hearsay since most of the original settlers/occupants of the native customary land who foraged, cleared and/or cultivated the land way before 1958 would be long gone when the case goes to court. (Emphasis added.)

[20] The appeal before us was obviously against the finding of facts made by the learned trial judge. It was for the plaintiffs to convince us that the learned trial judge had misdirected himself on the evidence and the court's conclusions were against the weight of evidence. In other words it was for the plaintiffs to demonstrate that the dismissal of the plaintiffs' claim was plainly wrong and warranted appellate intervention.

[21] In our considered assessment, the outcome of this appeal turned on two key questions, namely, the following:

(a) whether the plaintiffs had with some exactitude established on evidence before the court the precise 'location' in terms of boundaries of the land over which they assert that they have inherited NCR; and

(b) whether on evidence the plaintiffs had also established such claimed NCR rights were created by their forefather over that area in question before 1 January 1958.

[22] The submissions surrounding the plaintiffs' 'Map/Plan X' attached to their statement of claim would principally feature in a consideration of the first question. The letter of the 26 August 1992 and the evidence and contentions surrounding the said letter would predominate in a determination of the second issue identified above.

[23] It was conceded before us by counsel for the plaintiffs that 'Map/Plan X' had not been formally admitted as evidence during the trial or it's maker called to verify the sources relied upon or otherwise to confirm its accuracy. From the evidential perspective of this case, this fundamental threshold obligation on the plaintiffs to identify the location of the subject NCR claim by way of its approximate boundaries at least, had therefore not been met at trial by the plaintiffs (see the case of *Superintendent of Lands and Surveys Department Sibu Division & Anor v Usang ak Labit & Ors and another appeal*).

[24] What the plaintiffs appear to be now relying upon to identify the claimed NCR land limits, was merely the material that had been introduced instead by the defendants in their evidence. This was obvious as before us counsel for the plaintiffs was restricting the appeal to the claimed land area to 58.9 hectares (not 85.9 hectares as pleaded) coinciding with the 'Area of Shifting Cultivation' that had been identified from the available aerial photographs of that region taken in 1947 and subsequently in 1962.

[25] In our considered view this 'fall-back' approach that has been taken by the plaintiffs to identify the exact alleged encroached area ought not to be condoned by the courts, that is, notwithstanding the application of a flexible approach as judicially encouraged with respect to dealing with NCR claims. If

such a latitude was allowed wherein the plaintiffs' required proof of the location was based solely on the defendants' evidence, this would, in our assessment, amount to the courts approving a shifting of the burden of such proof (which was always upon the plaintiffs), to the state and other affected parties, rather to disprove such NCR rights. There was therefore merits in the submissions of the state legal officer for the second and third defendants, that in this case there was no evidence from the plaintiffs duly admitted by the court as proper evidence as regards the location of the claimed NCR area for the court to adjudicate upon and accordingly, no further enquiry was necessary.

[26] In any event, even if the plaintiffs were allowed to rely on the material that had been put in evidence for the defendants, it was obvious that the 1947-aerial photographs was indicative only of an 'Area of Shifting Cultivation' of about 58.9 hectares in that locality. It still begged the question who had cleared the same, and more pertinently if it was indeed the plaintiffs' ancestors who had cleared and used that area. It should be pointed out here that having examined the notes of the trial, the learned trial judge was in our assessment correct to conclude that such of the plaintiffs who testified in court were not able to personally identify the plots of land over which they or their forefathers had allegedly NCR claims, that is even with reference to 'Map/Plan X'.

[27] Even if the above hurdle is held to have been crossed by the plaintiffs, the consequential question was whether the plaintiffs had on evidence shown on a balance of probabilities that such claimed NCR rights were created by their own forefathers over that land (now reduced area) before 1 January 1958. We were of the view that the learned trial judge did not misdirect himself in the conclusion drawn from the letter of the 26 August 1992 seeking an allotment of land for farming that the plaintiffs or their immediate ancestors, if at all, had only come onto the land in the 1970's or thereabouts to cultivate the same. There was no shred of evidence before the court that any of the plaintiffs' forefathers had carried out some physical activity on the claimed area prior to 1 January 1958 to displace that conclusion.

[28] The first, sixth, ninth, tenth and twelfth plaintiffs were signatories in the list attached to that letter of 26 August 1992 and it was never adverted to in that letter that the subject land had been cleared, cultivated, used or even settled prior to 1 January 1958 by any of their ancestors. What more there was outright admissions by PW2 (tenth plaintiff) and PW10 (twelfth plaintiff) that the plaintiffs had not come to the land prior to the 1970s. Relevant extracts from the testimony of PW2 and PW10 were as follows:

PW2:

> Q: Put that in 1995 there were no houses on the land area in Sungei Adong following this drawing at page 466 BOD 5.

A: No houses but only 'pondok rehat'

...

...

Q: You began to cultivate the land in 1970s?

A: Yes

PW10:

Q: Put that Bohari bin Jaya and all the claimants in this case actually moved into the disputed area in about 1970s.

A: I agree.

[29] It is pertinent to note here that PW10 was the senior most in age among the plaintiffs (the first plaintiff had died prior to the commencement of the trial). We did not find any reason therefore to fault the learned trial judge in the inference the court drew from the contents of the said letter and the testimonies of witness that no case had been made out to the effect that the plaintiffs or their ancestors had been on any part of the claimed land prior to 1 January 1958.

[30] We did not agree with counsel for the plaintiffs that the learned trial judge had ignored the testimony of PW4, PW5 and PW12, allegedly uninterested witnesses, called by the plaintiffs. We have gone through their evidence. PW4 had stated categorically that the first plaintiff moved to Sungai Adong only around 1975 and the first plaintiff was from Pujut Miri. Similarly PW5 (the agricultural officer in that area in mid-1970s)) agreed that he would not personally know if any of the plaintiffs had established NCR over the subject land prior to 1 January 1958.

[31] We must also make particular note of the evidence of DW1, the *Penghulu* of the area, who was firm in his testimony that none of the plaintiffs had any NCR claims over the subject land. This evidence of a local chieftain remained materially unchallenged.

CONCLUSION

[32] This was a case that involved findings of facts and the learned trial judge was best placed to consider all issues with the audio-visual advantage of observing the demeanour of witnesses for the respective parties. As highlighted above, we were not persuaded that that there was any insufficient judicial appreciation of evidence or that the learned trial judge was plainly wrong such as to warrant appellate intervention (*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC); *UEM Group*

Berhad (dahulunya dikenali sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785 FC; *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80; [2013] 9 CLJ 828 (FC)). Upon our review of the material before the trial court, we found that the plaintiffs had on their evidence clearly failed to identify with some degree of certitude the location of their claimed NCR land and, even if the court was to be generous or flexible on this issue of threshold evidentiary requirement, it was clear to us that there was no evidence that such NCR over the land was in fact created prior to 1 January 1958 by the plaintiffs or their forefathers. There was no error on the part of the learned trial judge in his conclusions either in law or on the facts.

[33] We were constrained therefore to dismiss this appeal. In the light of this concurrent findings that the primary evidentiary hurdles had not been satisfied by the plaintiffs, there was no necessity for us to consider the other submissions of parties, in particular, whether the plaintiffs' action were statutorily time-barred or not, and as to the legal effect of the 'Provisional Leases' issued to the first defendant.

[34] In the particular circumstances surrounding the background of this collective claim, we were also of the view that no order for costs ought to be made against the plaintiffs (the appellants) and accordingly each party is to bear their own costs. The deposit is also ordered to be refunded to the plaintiffs.

Appeal dismissed.

Reported by Ashok Kumar